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SUDAN RURAL LAND GOVERNANCE (SRLG) PROJECT

LEGAL ANALYSIS OF LAND LEGISLATION IN SOUTH SUDAN

FEBRUARY 2013

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Tetra Tech ARD Principal Contacts:

Marc Dawson
Chief of Party
Tetra Tech ARD
Juba, South Sudan
Tel: 095 640 3592
Marc.Dawson@srlg-ard.com

Sandy Stark
Project Manager
Tetra Tech ARD
Burlington, Vermont
Tel.: 802-658-3890
sandy.stark@tetrattech.com

Megan Huth
Senior Technical Advisor/Manager
Tetra Tech ARD
Burlington, Vermont
Tel.: 802-658-3890
Megan.Huth@tetrattech.com

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The authors' views expressed in this publication do not necessarily reflect the views of the United States Agency for International Development or the United States Government.

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ACRONYMS AND ABBREVIATIONS

GOSS	Government of South Sudan
IDP	Internally Displaced Person
NPA	Norwegian People's Aid
SRLG	South Sudan Rural Land Governance
TA	Traditional Authority
USAID	United States Agency for International Development

EXECUTIVE SUMMARY

The South Sudan Rural Land Governance (SRLG) legal team studied the nineteen policy statements contained in the Draft Land Policy (Land Policy) and grouped them into eleven thematic land tenure and property rights topics presented below. The first paragraph under each is a summary of the guidance provided by the Land Policy to inform land legislation on that topic. The team then reviewed the Land Act and other legislation relevant to land tenure and property rights (Constitution, Local Government Act, Investment Promotion Act and Draft Land Act Regulations) to identify gaps and contradictions between the laws themselves and with the Land Policy.

This review is intended to serve as a comprehensive and targeted reference resource to assist the South Sudan Land Commission to prioritize its legislative initiatives to strengthen the legal framework governing land tenure and property rights in South Sudan. Each topic section concludes with recommendations and suggestions for strengthening specific provisions in the legal framework. The recommendations provide a starting point for the thorough legal analysis and full stakeholder consultation that will be required to further develop and strengthen laws responsive to South Sudan's land tenure and property rights challenges.

I.0 DEFINITION OF LAND TENURE SYSTEMS

The purpose of the Draft Land Policy (Policy) “is to ensure that the greatest numbers of citizens are secure in their rights to land as defined by law.” The Policy endorses the three types of tenure systems defined in the Land Act, 2009 (Land Act): public, community and private. The Policy provides that “citizens will enjoy high levels of security of tenure over their parcels and holdings, regardless of the tenure system under which it is held.” To help promote security of tenure, the legal framework governing land tenure and property rights should clearly define each type of tenure system and the rights conveyed under each. Security of tenure protects against “capricious or arbitrary loss of land rights.” It requires that fair and just compensation is paid to landholders whose land is taken to serve a public purpose.

**Draft Land Policy Statement 1:
Tenure Security Will Be Provided
Under a Diversity of Tenure
Systems**

I.1 DEFINITIONS OF LAND TENURE SYSTEMS

The Sudan Rural Governance Project (SRLG) contracted an expert legal consultant to provide comments during drafting of the Transitional Constitution of the Republic of South Sudan, 2011 (Constitution). The consultant explained “in South Sudan there are three types of land tenure systems: public land tenure, community land tenure, and private land tenure. Land ownership is those rights that could be granted under the three systems. These rights include customary ownership rights, freehold rights, and leasehold rights.” The terms used by the Land Act to describe tenure systems and rights confuse the two. Section 7 (2) provides “land may be acquired, held and transacted through the following tenure systems: a) Customary; b) Freehold; and c) Leasehold.” Additionally, the description provided in the Land Act is inconsistent with Article 171 (2) of the Constitution that defines the three types of land tenure as (a) public land; (b) community land; and (c) private land.

Public Land: Public land is defined with sufficient clarity and detail in Section 10 of the Land Act. The definition provided in Article 171 (3) of the Constitution, however, contains only two attributes. The SRLG legal expert was of the opinion that the definition contained in the Constitution should incorporate the attributes listed in the Land Act as the limited definition provided by the Constitution undermines the validity of the definition contained in the Land Act.

Community Land: Although Section 7 (2) of the Land Act uses the term “customary” rather than “community,” Section 11 provides the following definition for community land:

- (1) Community land shall be held by communities identified on the basis of ethnicity, residence or interest.
- (2) For the purpose of sub-section (1) above, “community land” includes:
 - (a) land lawfully registered in the name of group representatives under section 57 of this Act or any other law for the time being in force;
 - (b) land lawfully held, managed or used by specific community as community forests, cultivation, grazing areas, shrines and any other purposes recognized by Law;
 - (c) land lawfully transferred to a specific community by any process of law; and

(d) any other land declared to be community land by law.

Article 171 (5) of the Constitution defines community land as “all lands traditionally and historically held or used by local communities or their members. They shall be defined, held, managed and protected by law.”

The SRLG legal expert noted that the definition provided in the Land Act “relies too much on state formalization and recognition” and should include the Constitution’s references to traditional and historical use. That said, the expert was also of the opinion the Constitution’s definition should be expanded to include some of the wording from Section 11 of the Land Act.

Private Land: Section 12 of the Land Act defines private land as “1) any registered land held by any person under a freehold tenure; or 2) land held by any person under leasehold tenure; 3) any other land that may be declared private land by law.”

Article 171 (6) of the Constitution provides, “Private land shall include: (a) registered land held by any person under leasehold tenure in accordance with the law; (b) investment land acquired under lease from the Government or community for purposes of social and economic development in accordance with the law; and (c) any other land designated as private land by law.”

Unlike the Land Act, the Constitution does not explicitly recognize the legal possibility of privately owned land (“freehold”). According to the SRLG legal expert, the absence of a specific reference to private ownership of land in the Constitution “can act as a bar to its creation in the future, which was clearly anticipated in the Land Act and recommended in the draft Land Policy. In addition, the provision is inconsistent with other provisions throughout the Constitution referring to ownership of land by private entities.”

The expert went on to note that Article 171 (6) “appears to anticipate that leases from the government will be the primary form of private land tenure. This would be unfortunate. Leases of land from government are an appropriate tenure form, and provided for in some detail in Chapter VI of the 2009 Land Act. But a lease is always insecure to the extent that it is limited in duration. And in practice, governments usually opt for leasehold from government rather than freehold ownership precisely because they wish to limit the rights of the landholder and insert the state into the management of the land. This is in most cases unnecessary, given that government’s regulatory powers are adequate to protect the legitimate public interest in good management of land. It undermines landholder security of tenure and incentives, and because government sets rents, it prevents land acquiring its true market value. And by making security of tenure subject to administrative discretion of the leasing agency, invites corruption and other poor governance practices.”

1.2 RIGHTS TO LAND

Section 170 (1) of the Constitution provides “all land in South Sudan is owned by the people of South Sudan and its usage shall be regulated by the government in accordance with the provisions of this Constitution and the law.” Section 7 (1) of the Land Act provides essentially the same. SRLG commented previously that this definition requires additional clarification, especially in regards to the rights of communities to own land. “Land belongs to the community” was an important principle guiding the 2005 Comprehensive Peace Agreement. The terms “people” and “communities” and the rights to land possessed by each should be more clearly defined in the legal framework.

The Land Act also refers to private ownership of land in several contexts. The SRLG legal expert pointed out that if all land in the country is owned by the “people,” this would prevent private ownership as “two entities cannot own the same land.” To provide consistency with the existence of private ownership, the legal expert suggested Article 170 (1) contain the wording “Land in the South Sudan is the common heritage of the people of South Sudan and its sound management and administration by the various levels of government is a public trust.”

Included in the Constitution's Bill of Rights is the Right to Own Property. To give effect to this right Section 28 (2) provides "no private property may be expropriated save by law in the public interest and in consideration for prompt and fair compensation. No private property shall be confiscated save by an order of a court of law." The SRLG legal expert noted that the article only refers to private property and should also refer to customary property. Otherwise, customary rights may be less secure than private rights, thereby contradicting the protections afforded by Section 8 (6) of the Land Act that states "customary land rights including those held in common shall have equal force and effect in law with freehold or leasehold rights acquired through statutory allocation, registration or transaction."

The legal expert was of the opinion Section 28 (2) of the Constitution should also "enunciate a responsibility on the part of the government to protect property against takings and disturbance by non-state actors." It was suggested the provision contain conventional wording from many other constitutions such as "no person shall be deprived of his or her property except in accordance with the law and in compliance with the processes prescribed therein." The expert further suggested that Section 171 (10) of the Constitution addressing expropriation should specifically reference Section 28.

Section 28 (1) confirms the right of every person "to acquire or own property as regulated by law." The consultant suggested that Article 28 (1) also confirm the rights of refugees and displaced persons to restitution of lost property as provided under Chapter XIII of the Land Act and incorporate wording from Section 78 (1) of the Land Act.

Lastly, the legal expert was of the opinion the broad language contained in Section 28 (1) of the Constitution allows for foreign ownership of property. This appears to contradict Section 14 of the Land Act that limits the rights of non-citizens to acquire only "leasehold or other interest in Land for a specified period and not freehold in land in Southern Sudan."

Recommended modifications to law:

1. Amend terminology of land tenure systems in Section 7 (2) of the Land Act to reflect terminology of Section 171 (2) of the Constitution.
2. Amend definition of public land provided in Article 171 (3) of the Constitution in line with Section 10 of the Land Act
3. Amend Section 11 of the Land Act on community land to include the Constitution's references to traditional and historical use
4. Amend Article 171 (5) of the Constitution to include some of the wording from Section 11 of the Land Act in the definition of community land.
5. Amend Article 171 (6) of the Constitution to recognize the legal possibility of privately owned land ("freehold").
6. Amend Section 170 (1) of the Constitution and Section 7 (1) of the Land Act to clarify the terms "people" and "communities" and the rights to land possessed by each.
7. Amend Section 28 (2) of the Constitution to make clear that customary property cannot be expropriated unless if it is to serve a public interest and upon prompt payment of fair and just compensation. Amend Section 28 (2) of the Constitution to assign responsibility to the government to protect property against takings and disturbance by non-state actors.
8. Amend Section 171 (10) of the Constitution which addresses expropriation to specifically reference Section 28.
9. Amend Article 28 (1) of the Constitution to confirm the rights of refugees and displaced persons to restitution of lost property as provided under Chapter XIII of the Land Act and incorporate wording from Section 78 (1) of the Land Act.
10. Section 28 (1) of the Constitution which allows for foreign ownership of property should be made consistent with Section 14 of the Land Act that limits the rights of non-citizens to acquire land.

2.0 LAND ADMINISTRATION AUTHORITIES

Land administration is comprised by a set of processes to determine, record and disseminate information about the ownership, value and use of land and its associated resources. The Policy informs “an efficient land administration system, among other things, guarantees the recording of land rights, promotes tenure security, and guides land transactions.” The Policy notes South Sudan’s land administration system is “hampered by operational inefficiency and unclear roles and responsibilities” of ministries, state and county governments and traditional authorities. To address this issue, Policy Statement 6 applies the principle of subsidiarity in cases where different bodies of government hold concurrent land administration powers. It envisions local government taking primary responsibility for assigning and administering land rights with central authorities providing standards, ensuring compliance with the Constitution and federal law and coordinating roles and mediating disputes with lower-level government bodies.

Draft Land Policy Statements 17 and 6: On Efficient and Transparent Land Administration and On Assigning Roles and Responsibilities for Land Administration

The discussion below focuses on the roles of the various land administration bodies and land rights delivery, specifically, ascertaining administrative boundaries of state and local governments and boundaries of community and private land. In regards the other functions of a land administration system:

- Adjudication and registration of land rights will be discussed under Policy Statement 11: On Land Rights Registration and Land Records
- Allocation and management of land and facilitation of a land market will be discussed under Policy Statements 12 and 13: On Development of Land Markets; On Promoting Private Investment
- Establishment of mechanisms for land disputes resolution will be discussed under Policy Statements 10 and 19: On Mediation of Land Rights Conflicts; On Mediating Land Use Conflicts

The Policy recognizes legislation is not in place and must be drafted to assist development of a land information system, land valuation procedures for taxation and survey standards.

2.1 ROLES OF LAND ADMINISTRATION BODIES

2.1.1 National and State Land Administration Bodies

The Constitution lists the roles and jurisdictions of national and state land administration institutions in Schedules A, B, and C. Schedule A (17) provides for exclusive national powers over “National Lands and National Natural Resources”. Schedule B (7) provides for exclusive State Powers over “State Land and State Natural Resources”. Schedule C (27) provides for concurrent national and state powers over the “regulation of land tenure, usage and exercise of rights in land.” The SRLG legal expert noted it is not clear whether Schedules A and B refer to all land or only public land. Moreover, the Land Act does not define the terms “National Lands” and “State Land.” As such, it is not possible to know which land and resources pertain to

the nation and the states. The terms need to be defined and the area of land they pertain to needs to be ascertained, most likely through a survey inventory.

Additionally, none of the Schedules lists land administration as a duty. The legal expert was of the opinion that the concurrent power in Schedule C (27) should contain the wording “Regulation of land tenure, land administration, usage and exercise of rights in land.” The consultant noted that while states may play a major role in land administration, “there will be some need for uniform national standards to ensure the smooth functioning of a national market in land rights.”

Lastly, the South Sudan Land Commission will perform important land administration duties. Section 52 of the Land Act provides that the Land Commission will exercise the functions and duties as stipulated in the Constitution. Article 172 of the Constitution provides only that the Commission shall be established and “the structure, composition, functions, powers and terms and conditions of service of the Chairperson, Deputy Chairperson, Members and employees of the Commission shall be regulated by law.” The SRLG legal expert noted that it would be more logical for the Land Commission to be listed as an independent institution under Part Nine of the Constitution and that inclusion of traditional authority representatives on the Commission should be considered. Most significantly, the consultant was of the opinion that “it is inappropriate to provide for such a Commission without indicating its responsibilities.” The Land Commission may lack the authority to function if its jurisdiction, powers and duties are not provided by law.

2.1.2 Local Land Administration Bodies

Both the Land Act and Local Government Act govern devolved local land administration powers. Section 46 (1) of the Land Act appears to provide the County Land Authority with executive powers to administer and manage land as it is empowered to “hold and allocate public lands vested in it with the approval of the Concerned State Ministry...” The Local Government Act appears to provide the Council Land Committee or Authority¹ only advisory powers such as “development of land registration, distribution and allocation schemes and schedules for Council and management” as provided in Section 91 (3) (f). Moreover, the Local Government Act treats land management separate from land administration and empowers the Local Government Council, not the Land Committee, to administer and manage council land under Section 92 (1).

Another inconsistency between the two laws is the level of decentralization. The Land Act decentralizes land administration to the payam level in Sections 49 and 50. The Local Government Act goes further in Section 91 (4) (b) providing “The Council shall form sub-committees to perform the same functions of the Council Land Committee at Boma or Quarter Council level.”

Such inconsistencies produce confusion and inconsistent application of the law. As it appears the legislature intended the Land Act to control matters related to the administration of land, the Local Government Act should be amended to be consistent with the Land Act.

Neither law provides procedures or legislative guidance to these bodies to perform their land administration functions. Additionally, the laws do not clarify the roles between the state and local land administrative bodies or provide procedures to ensure there are no gaps or overlaps in their jurisdictions.

The Draft Land Act Regulations clarify in Section 5 (1) that “Administration of land shall be a shared responsibility between the GOSS and State governments in accordance with the provisions of the Constitution.” In regards to both the County Land Authority and the Payam Land Council, the Draft Regulations provide the bodies shall meet at least once in every quarter, but may hold such additional meetings as may be necessary. A complete record of all proceedings and all decisions shall be made in writing. Section 8 (6) of the regulations provides that “the Concerned Minister may in consultation with the Minister issue such rules and regulations as may be necessary for the better functioning of Payam Land

¹ Sections 15 and 16 of the Local Government Act list the tiers and local councils that comprise local government. Reading these sections together, it appears the term “Council Land Committee or Authority” refers to the same body as the term “County Land Authority” used in the Land Act.

Councils.” The regulations do not specify the ministry responsible to regulate the work of local land administration, further clarify the roles and responsibilities of these bodies or provide a procedural framework to manage and administer land.

2.2 LAND RIGHTS DELIVERY- ASCERTAINING BOUNDARIES

2.2.1 State Administrative Boundaries

Article 41 (4) of the Land Act provides “without prejudice to the rights of the Government of Southern Sudan on Land, each State Government shall be charged with the management and administration of land within its jurisdiction for the benefit of the people of Southern Sudan in accordance with...the Constitution and this Act.” The borders of land to be managed by a state, as well as the borders of the state itself, must be defined before institutional mechanisms can be mobilized to ascertain and register rights under South Sudan’s three land tenure systems. The Land Act appears to presume that state boundaries are already fixed and do not need to be ascertained and demarcated. The Act does not address the issue of boundary disputes between states.

The Constitution provides in Article 59 (9) that the Council of States has the authority to approve changes to state boundaries and in Article 162 (3) that “State boundaries shall not be altered except by a resolution of the Council of States approved by two-thirds of all members.” State boundaries are an exclusive national power under Schedule A (55). Section 126 (2) (i) provides the Supreme Court “original and final jurisdiction to resolve disputes between the states and between the National Government and a state in respect of areas of exclusive, concurrent or residual competences.” It is not clear if this provision would apply to boundary disputes between states.

The Local Government Act also does not address the process of ascertaining and defining state administrative boundaries. In the event of a boundary dispute between two Local Government Councils in neighboring states, Article 128 paragraphs (3) – (5) provide that the aggrieved Council shall raise the issue to its state authorities who will attempt to resolve the matter with the state authorities in the neighboring state. If the states are unable to resolve the matter, either state may refer the matter to the Local Government Board for consideration. If either state is dissatisfied with the decision of the Local Government Board, the Board “shall refer the matter to the President whose decision shall be final and binding.” The article provides no further guidance or references specific procedures to be followed.

2.2.2 Local Administrative Boundaries

Section 7 (6) of the Local Government Act provides “the boundary of each Local Government Council shall be demarcated in accordance with the provisions of this Act.” Section 88 (1) (a) adds that “the territorial boundaries of every Council established in accordance with the provisions of this Act, shall be demarcated and gazette by the Government of Southern Sudan.”

Section 20 (4) provides “The boundaries of each Local Government Council shall be demarcated and determined by a committee established by the Government of Southern Sudan.” This committee is not named in the Act and reference to it was not found in the relevant legislation reviewed for this document. Section 20 (5) provides “Each Local Government Council shall be established by a warrant showing its jurisdiction, type of authority, territorial boundary and a map of its area duly signed by the President and attached.” According to Section 124 (c) the warrant of establishment is to be prepared by the Local Government Board. The Local Government Board is established in the Office of the President under Article 166 (3) of the Constitution and is responsible “to review the local government system and recommend the necessary policy guidelines and action in accordance with the decentralization policy enshrined in this Constitution.” None of these provisions provide guidance and procedures to demarcate and register local administrative boundaries.

Disputes between Local Government Councils in the same state over administrative boundaries, grazing areas and water points are addressed under Section 128 (2) of the Act. It provides the councils “(a) shall settle any

such disputes amicably among themselves through the involvement of the Traditional Authorities and the use of traditional conflict resolution mechanisms; and (b) where the contesting parties fail to resolve their dispute amicably they shall, raise the matter to the State Authorities to constitute a special tribunal to mediate or make decision, as the case may be.” The Article provides no further guidance nor does it reference specific procedures for constituting the special tribunal or to guide the process of dispute resolution.

The Land Act is silent on this issue.

2.2.3 Community and Pastoral Land Boundaries

Section 6 (4) of the Land Act provides “all lands traditionally and historically held or used by local communities or their members shall be defined, held, managed and protected by law in Southern Sudan.” Section 42 (11) provides only that State Government is responsible for “delimitation of boundaries between community lands.” The Act provides no further guidance or procedures to ascertain, define and demarcate boundaries of community land.

In regards pastoral lands, Section 66 (1) of the Land Act provides “pastoral lands in Southern Sudan shall be delineated and protected by the appropriate level of land administration and management based on a comprehensive land use planning system.” No mention is made of the land administration body responsible to delineate pastoral land boundaries or the procedures to guide the process.

Section 114 (2) of the Local Government Act provides for the creation of autonomous chiefdoms within the County or Town Council “in which the people shall organize their traditional institutions of governance and choose their leaders to administer themselves.” Sub-section (3) requires the territories and boundaries of the Chiefdoms to be determined and demarcated by local legislation and regulations. The Act does not specify the body responsible to ascertain, define and demarcate boundaries of Chiefdoms. Additionally, autonomous Chiefdoms are not referred to elsewhere in this Act or the Land Act.

2.2.4 Boundaries of Private Rights to Land

Section 53 (2) of the Land Act provides that “land collectively or individually owned in South Sudan shall be registered and given title in accordance with this Act.”² Section 55 (2) of the Land Act provides that “initial registration shall be implemented through systematic land registration or/and upon request.” According to Section 55 (3), the Concerned State Ministry in the State may declare an area to be a systematic registration area. Under Section 55 (4), the Concerned State Ministry then requests the Ministry of Housing, Physical Planning and Environment at the national level to carry out the systematic registration activities.

Although the National government is responsible to carry out systematic registration, Section 43 (12) of the Act provides the State is responsible for “contiguous registration within the state.” At the county level, Section 46 (4) and (5) provides the Land Authority is responsible to “facilitate the registration and transfer of interest in land and support and assist any cadastral operation and survey in its jurisdiction.” The Payam Land Council is responsible to “support the registration and transfer of interests in land” under Section 50 (4).

The Land Act does not regulate how systematic registration is to be carried out. It also does not provide for any adjudication and demarcation procedures to determine boundaries. It appears the only adjudication procedures currently available are those contained in the Land Settlement and Registration Act, 1925 and this law may no longer be applicable in South Sudan. Additionally, the Act does not clarify the roles or provide procedures to coordinate adjudication and registration procedures between levels of government. A comprehensive set of legislation is required to guide the process of systematic registration. Such legislation will require detailed procedures providing legal criteria to adjudicate land rights and provide due process safeguards. Technical mapping and registration procedures will also be needed to ensure accurate registration of land rights information in a data management system. Such complex issues would be more comprehensively addressed in a separate piece of legislation dedicated to systematic registration.

² The Constitution does not explicitly recognize the legal possibility of privately owned “freehold” land.

Section 91 (f) of the Local Government Act requires Council Land Committees or Authorities to develop land registration schemes. This provision would appear to provide county authorities with registration powers beyond the facilitating and supporting role described by the Land Act

Recommended modifications to law:

1. Amend Schedule A (17) and Schedule B (7) in the Constitution to clarify if sections pertain to national and state powers over all land or only public land.
2. Amend the Land Act to define the terms “National Lands” and “State Land” so that it is possible to know which land and resources pertain to the nation and the states.
3. Amend Schedule C (27) of the Constitution to include uniform national standards to ensure the smooth functioning of a national market in land rights.
4. Amend Part Nine of the Constitution to list the South Sudan Land Commission as an independent institution, outlining its jurisdiction, powers and duties.
5. Amend the Land Act and Local Government Act to provide procedures to the County Land Authority and Payam Land Council to perform their land administration functions and clarify the roles between the state and local land administrative bodies.
6. Draft a new law and implementing legislation to guide the process of systematic registration.

3.0 REGISTRATION AND LAND RECORDS

Registration data includes maps of adjudicated boundaries and information about the legal rights upon which adjudication was based. The Policy recognizes that “land rights registration has an important and growing role to play in extending tenure security to land holders.” Recording and managing accurate and secure registration data is essential to facilitate a well-functioning land market.

**Draft Policy Statements 11 and 12:
On Land Rights Registration and
Land Records and On Development
of Land Markets**

The Policy recommends new legislation to establish and govern a national land registration system. It also recommends the promulgation of a comprehensive Community Land Act that will address “how and under what circumstances” customary rights will be recorded and “under what statutory authority land records will be maintained.” As recording of both individual and community rights will help develop South Sudan’s land market, the Policy recommends that the future Community Land Act “recognize and accommodate market transactions for rights in community land through provisions that help ensure they take place with due consultation with existing rights holders and after review by appropriate local authorities.”

Until such time that a comprehensive Community Land Act is passed, the Land Act will govern registration of community land. In addition to the provisions discussed above related to ascertaining community boundaries, Section 58 currently provides:

(2) Community land may be registered in the name of the following:

a community;

a clan or a family in accordance with the customary practices applicable;

a community association in accordance with the document constituting the association; or

a traditional leader in trust for the community and with the consent of the members of the community.

(3) Individual members of a specific community may be entitled to request individual registration after the particular plot of land has been partitioned from the relevant community.

(4) Such partition referred to in subsection (3) above, shall be operated in respect to custom and practices of the community.

Section 58 touches upon issues beyond procedures to register community rights. It defines substantive legal rights that will likely be regulated by a future community land law. This section should be revisited once the Community Land Act is passed.

Section 59 of the Land Act requires a “community land enquiry” be conducted by representatives of the Land Registration Office. The purpose of the enquiry is not stated in the Land Act. As such, it is not clear if communities have a greater or lesser burden of proof than other entities to demonstrate their right to property. For example 59 (3) requires the land office representative to enquire as to “the purpose for which the community purports to use the land in question.” In the absence of clearly defined criteria for the enquiry, this would appear to provide an administrative official wide discretion to adjudicate substantive legal rights.

Registration data alone will not promote security of tenure and market transactions. The data must be stored and managed in a secure recording system. Section 54 (1) of the Land Act requires the land registry to “be established within the Ministry of Housing, Physical Planning and Environment in the Government of Southern Sudan and shall be decentralized...” Under Section 54 (2) a state level land registry shall be “kept in coordination with the Ministry of Housing, Physical Planning and Environment; and under 54 (3) “registration offices shall be established at each level of land administration” in the country to facilitate and support registration.

Although these provisions reflect the principle of subsidiarity, they do not describe the roles and responsibilities at each level of government and how the functions of each will be coordinated. For example, the Act does not require national land registration officials to produce standards and specifications to ensure uniform registration of rights in decentralized registries. Such standards are necessary to assign each parcel of land a unique reference number as required under Section 57 (3) (a) of the Land Act.

Lastly, given resources and technical capacity available to local government, it may not be feasible to establish a land registration office at each level of land administration in the country.

Recommended modifications to law: None in this section; see other sections above and below for amendments that impact community land tenure.

4.0 COMMUNITY LAND TENURE

The Land Policy recognizes role played by community land tenure systems to provide land at little or no cost to millions of South Sudanese, particularly the rural poor. Despite the fact that community tenure systems “provide an important safety net that can help reduce poverty”, they are often viewed as informal and provided a lower status than other forms of tenure. As such, holders of customary rights under community tenure systems “have been vulnerable to taking of rights without due process or just compensation.” For this reason, the Policy provides for statutory recognition of community tenure arrangements through promulgation of a Community Land Act.

Provisions contained in the current legal framework to define the community land tenure and rights within it, identify limits of community land and register community rights have been examined. Ultimately the purpose of these provisions is to provide communities with security of tenure. The

Draft Land Policy Statement 8: On Community Land Tenure Systems

litmus test to measure community tenure security is the extent to which communities are protected against arbitrary taking of land without adequate compensation. Discussed below are current provisions regulating private investment and expropriation and their impacts on security of community tenure. The issues identified will help inform drafting of key provisions of the future Community Land Act identified under this Policy Statement.

Recommended modifications to law:

1. Amend Section 59 of the Land Act to define criteria for the “community land enquiry” at the Land Registration Office.
2. Amend Section 54 (1), (2) and (3) of the Land Act to describe the roles and responsibilities for a land registry at each level of government and how the functions of each will be coordinated.
3. New legislation governing the process of systematic registration should contain technical standards and specification to ensure uniform recording of land rights.

5.0 LAND FOR INVESTMENT

The Policy views acquisition and allocation of land as an important means for promoting private investment to develop the national economy and create jobs. The Policy “encourages development of a balanced and integrated rural agricultural economy that accommodates... small-scale family farms dedicated to production for family consumption and sale as well as larger-scale commercial enterprises oriented to market production.” The Policy recognizes that community land used in common has been alienated by government officials for public use and private benefit without taking into account the ownership interests of communities. To protect community land rights and reduce poverty, the Policy encourages legislation to provide communities, through local government bodies, legal standing to lease land to outside investors. Such arrangements should ensure benefits from agricultural, water use and natural resource projects requiring large areas of land accrue to local low-income land holders. Where investment projects result in the loss of community land rights, community members are compensated according to law. The Policy recognizes that those impacted by such projects “will have the opportunity to present their views directly or through designated representatives before decision-making authorities.” To ensure such development projects are implemented transparently, Policy Statement 1 endorses the principle that “legally-constituted bodies charged with allocating land...should be constituted by citizen members appointed from various representative bodies.” The Policy emphasizes that all affected stakeholders must have clear knowledge of the boundaries of land allocated for investment and the terms of its allocation. It recommends appropriate government authorities work with investors and communities to delimit boundaries of land to be allocated and negotiate terms for its use. It also recommends developing and enforcing zoning requirements for allocated land and streamlining procedures for acquiring land for allocation.

Draft Land Policy Statement 13, 18, 2, 15 and 5: On Promoting Private Investment, On Balanced Land Use and Agricultural Development, On the Role of Security of Land Tenure in Reducing Poverty, On Community Rights to Natural Resources Used in Common and On Public Participation

The current legal framework governing acquisition and allocation of land for investment purposes appears to fall short of the norms prescribed in the Policy. According to a report produced by the Norwegian People's Aid (NPA) “due to the legal ambiguity of the transitional context, there is currently no uniform procedure for managing large scale land acquisitions. Applications for land are managed through ad hoc procedures at various levels of government, contributing to a lack of transparency and accountability with regard to many deals.”³ The report also notes that “under current practice, investment activity is mostly managed at the state-level. GoSS only takes the lead for so-called ‘national projects’.”⁴

Reading Sections 4 (2) and 7 (2) of the Investment Promotion Act, 2009 (Investment Act) together, makes clear that the South Sudan Investment Authority is responsible to promote and “facilitate all investment activities in Southern Sudan”. Under Section 21 of the Investment Act national and foreign investors are required to submit an application to the Authority for an investment certificate and cannot invest in South

³The New: Frontier A baseline survey of large-scale land-based investment in Southern Sudan. Deng, David K. Researched by GADET-Pentagon and the South Sudan Law Society. March 2011. P. 20. http://www.npaid.org/filestore/NPA_New_Frontier.pdf

⁴ Ibid. P. 36

Sudan until they are issued one as provided in Section 24 (3). The Authority's role in issuing certificates is to review and ensure the investment is lawful and its activities will benefit South Sudan according to the criteria listed in Section 22 (3). According to Section 32, investors to whom certificates are issued are entitled benefits and incentives described in the Investment Act's Second Schedule. Benefits and incentives include tax exemptions and capital allowances. The Investment Act does not clearly define the roles and responsibilities of the Investment Authority to promote and facilitate investment. The Investment Act does not, for example, mandate the Authority to set national standards or guidelines to ensure uniform investment practices at state and local levels. The Investment Act does not expressly require the Authority to monitor investment activities and does not contain provisions to coordinate investment activities at the national and state levels.

5.1 ACQUISITION OF LAND FOR INVESTMENT

The Second Schedule of the Investment Act also provides in Section 3 that “the Government of Southern Sudan and the Local Authorities shall provide land for investment in any of the priority areas mentioned in the First Schedule.” These priority areas are not geographic; rather they refer to types of investment, the majority of which are agricultural, water use and natural resource development initiatives that require extensive areas of land. Such projects will typically be carried out on land claimed by communities.

Although Section 6 (2) (b) of the Investment Act empowers the Investment Authority to acquire and dispose of immovable property, it provides no guidance or procedures through which the Investment Authority, GoSS or Local Authorities are to acquire land for investment purposes. Furthermore, the Investment Act makes no reference to Chapter IX of the Land Act, “Acquisition of Land for Investment Purposes.” Section 61 (3) of the Land Act provides “the Government of Southern Sudan and any State Government may adopt a land zoning system in consultation with the community concerned in Southern Sudan in compliance with the existing Land Use Plan.” Section 61 (2) provides “in accordance with the provisions of the Investment Act, 2008, land may be delineated into zones with in every State in Southern Sudan based on a comprehensive Land Use Plan, which shall be vested in the Southern Sudan Investment Authority in order to encourage private investment.” The Investment Act, however, makes no mention of delineating land into zones for investment. Moreover, it is not clear how such activities, by themselves, would constitute a legal mechanism through which government could acquire land.

Neither the Constitution nor the Land Act provides states with the power to acquire land. The Local Government Act, 2009, however, provides in Section 89 “the procedure for acquiring *community land* within a Local Government Council area for Government and other uses shall be the function of the respective Council” (emphasis added). This provision is inconsistent with Section 46 of the Land Act that does not provide such authority to the County Land Authority. Additionally, none of the laws comprising the legal framework, including the Draft Land Act Regulations, 2010 (Draft Regulations), provide procedures through which any level of government may acquire land.

In addition to a lack of procedural guidance, neither the Land Policy nor the laws that comprise the legal framework define the term “acquire” and the context in which it will take place. Nonetheless, the options for government land acquisition are limited: government may purchase land from an owner willing to sell; land may be donated or surrendered to it (as in the case of private land where the owner dies and has no heirs); otherwise it may take land through compulsory acquisition. The circumstances surrounding each option are very different and will require a discrete set of procedures. The legal framework should make clear that in the absence of voluntary transfer or surrender of land to the government, acquisition of land for investment would constitute expropriation and should be carried out according to laws that govern expropriation.⁵

⁵ Please see below Policy Statement 4: On the Right of Eminent Domain

5.2 ALLOCATION OF LAND FOR INVESTMENT

Assuming government has vested rights in land it wishes to make available for investment, transparent procedures should be in place to guide the process under which institutions allocate rights to legal or physical persons. Allocation of government land is, in essence, privatization of public assets. It is important to ensure that public assets are transferred to individuals and private companies under fair, equitable, transparent and competitive processes that ensure the assets are disposed in a manner that provides best value and serves public interests. These objectives could be met through procedures requiring public notice of land allocations, transparent evaluation criteria and an open and competitive bidding process to ensure market price is realized for privatized land. At present, such procedures do not appear to be in place to guide the privatization/allocation process.

The Investment Act provides no guidance or procedures through which the Investment Authority may dispose or otherwise allocate rights in public land it holds as provided by Section 6 (2) (b) of the Act. Coordination between the Authority and states to implement development projects on government land is also not addressed. Although Schedule B (11) of the Constitution provides states with exclusive powers to manage, lease or utilize lands that belong to the state⁶, the legal framework contains no provisions that specifically empower states to allocate lands. The Land Act in Section 46 (1) does provide the County Land Authority with the authority to “hold and allocate public lands vested in it with the approval of the Concerned State Ministry in the State subject to town and municipal planning in the County.” Section 50 (1) provides the Payam Land Council with authority for the “allocation of public land vested in it with the approval of the Concerned Commissioner.” Section 91 (3) (f) of the Local Government Act, 2009 requires the Council Land Committee or Authority to develop “allocation schemes and schedules for Council land management.” Neither the Land Act nor Local Government Act provide or reference any procedures to govern the allocation of land. The Draft Regulations are also silent on allocation. Additionally, the lack of procedures to ascertain and demarcate boundaries of public land vested in national, state, and local government bodies will complicate the allocation process and may lead to conflict.

The only provisions in the legal framework that specifically discuss allocation or lease of land for investment purposes are those in the Land Act that deal with customary rights to community land. These are Section 15 “Allocation of Customary Rights to Land” and Section 27 “Lease on Customary Land Rights.”

Although both Sections 15 and 27 of the Land Act address allocation of community land for investment, it appears Section 15 applies to allocation to community members. According to Section 15 (1), it is only the Traditional Authority (TA) and not the government that has the authority to allocate “customary land rights.” Section 15 (2) provides “subject to consultation with other members of the community, the Traditional Authority shall determine the size and the boundaries of the portion of land in respect of which the right is allocated in accordance with customary law and practices.” In the event the allocation is under 250 feddans, the Traditional Authority is required, prior to allocation, to notify the County Land Authority or Payam Land Council as provided under Section 15 (3). In cases where the Traditional Authority allocates more than 250 feddans for commercial, agricultural, forestry, ranch, poultry or farming purposes, Section 15 (6) requires the allocation to be approved by the Concerned Ministry in the State who is required to verify the purpose for which the land is to be used complies with state law, land use plans and environmental regulations. Additionally, the Concerned Ministry is to verify consensus among the community for the allocation. The Land Act does not, however, define the requirements for community consultation and the procedures to guide the process. Additionally, the Land Act does not require consultation with neighboring communities to ensure the land allocated by the Traditional Authority does not belong to or is claimed by the neighboring community. No provisions are made for local citizens to serve on bodies that allocate community land as recommended under Land Policy Statement 1.

⁶ As discussed in Policy Statement 1 above, the term “state land” is not defined in the Land Act. As such, it is not clear what lands state authorities may lease.

Section 27 (1) of the Land Act governs leases of customary land rights to natural or legal persons who are not members of the community. It provides “subject to consensus between members of the community, Traditional Authority may recommend the grant to a person or company, whether national or foreigner, a right of leasehold in respect of a portion of community land to the appropriate land administration.” In the event the land to be leased is more than 250 feddans, Section 27 (3) provides the “concerned Ministry in the State shall in consultation with the Investment Authority approve the lease contract granted by the Traditional Authority.” Similar to Section 15, the Concerned Ministry under Section 27 (4) is required to ensure members of the community were duly consulted, the investment activity complies with applicable legislation and “contributes to the social and economic development of the community, the county or/and the state.” Again, the Land Act does not define the requirements and procedures to ensure “members of the community are duly consulted.”

Recommended modifications to law:

1. Amend the Investment Promotion Act to clearly define the role of the Investment Authority (i.e. establish national, uniform standards for investment and monitor investment activities) and to coordinate investment activities on the national and state levels.
2. Amend the Investment Promotion and Land Acts to clearly define “acquisition of land” in the investment context, the circumstances under which it is to take place and when it is to be carried out according to the laws on expropriation.
3. Amend the Investment Promotion Act to provide transparent competitive bidding requirements and procedures to govern the allocation of public land for investment purposes.
4. Amend the Investment Promotion Act and Sections 15 (2) and 27 (4) of the Land Act to define the requirements of community consultation and provide procedures under which it is to take place.

6.0 EMINENT DOMAIN

The Policy recognizes that the power of “government to take or allocate land from private owners as well as regulate land-use in the public’s interest is a common tool of governance worldwide.” The power is not unlimited and is “subject to the test of whether or not there is compelling public health, economic growth, or environmental protection objectives at stake in which the public has an interest.” In addition to ensuring that the taking of land from communities and individuals is done to serve a compelling public need and with timely payment of fair and adequate compensation, “the law of eminent domain shall provide affected stakeholders, including individuals and organizations, with a legitimate interest to seek an injunction from the judiciary against the exercise of this authority.” The Policy provides that “government’s power of eminent domain is restricted to securing land for public use only, and not for subsequent transfer or sale to private individuals.”

Draft Land Policy Statement 4: On Eminent Domain

Section 28 (2) of the Constitution’s Bill of Rights provides “No private property may be expropriated save by law in the public interest and in consideration for prompt and fair compensation. No private property shall be confiscated save by an order of a court of law.” This section does not reference customary rights to community land. Instead, Section 171 (10) provides “communities and persons enjoying rights in land shall be entitled to prompt and equitable compensation on just terms arising from acquisition or development of land in their areas in the public interest.” Customary rights should be included in the Bill of Rights to avoid the risk of making them less secure than private rights.

Section 8 (2) of the Land Act similarly provides “no right in land shall be expropriated or confiscated save by law in the public interest and in consideration for a prompt and fair compensation.” It does not mandate that expropriation be carried out only upon order of a court. This is a significant inconsistency that should be addressed. The Land Act must provide the due process safeguards required by the Constitution’s Bill of Rights. Section 171 (10) of the Constitution also omits the requirement of court order and should be consistent with Section 28 (2).

Section 170 (2) of the Constitution provides “the government at all levels, may expropriate land in the public interest as shall be prescribed by law.” Section 73 (2) of the Land Act provides the Ministry of Housing, Land and Public Utilities shall carry out any expropriation plan initiated by the Government of South Sudan in consultation with the Compensation Committee established under Section 76 of the Act and in coordination with State Government. Section 73 (3) provides the Concerned Ministry in the State shall carry out any expropriation plan initiated by State Government in consultation with the Compensation Committee. Under Section 73 (4), however, it appears local government units do not have the power to expropriate land. Instead, it appears local government units are required to coordinate with the Concerned Ministry in the State in instances where “expropriation is required for the conduct of their activities within their jurisdiction” and it is the Ministry that executes the expropriation. This interpretation is supported by the absence of any provisions related to expropriation in the Local Government Act, 2009. If this is a correct interpretation then Section 73 (4) does not appear consistent with the Constitution.

To be lawful, expropriation must be carried out in the interest of the public. Under the Land Policy, government is prohibited from expropriating land for public use and then transferring the land to private individuals. This raises the question of whether community land may be expropriated and then leased to a private company.

The Investment Act provides broad, general criteria to determine whether an investment project is beneficial to South Sudan in Section 22 (3). These include creation of employment, acquisition of new skills and technology, contribution of tax revenue, production and utilization of domestic raw materials. In regards to

benefiting communities, the “contribution to the socio-economic and cultural amenities ... e.g. health centers, schools, feeder roads, water supply, sports, cultural events,” it is not clear if such criteria are sufficient to demonstrate how the investment serves the public interest. The definition of public interest contained in Section 73 (5) of the Land Act also does not provide criteria to determine which investment projects will serve the public interest. Although Sub-section (h) provides flexibility and discretion to a decision maker to determine the circumstances under which an investment project could serve the public interest, it does not provide guidance to assist decision makers to make consistent and uniform decisions to distinguish between investment projects that would benefit the public/community as whole and which projects would primarily generate profits for a private company that employed a relatively small number or community members.

The threshold issue to be decided prior to expropriation to ensure it is lawful is whether the expropriation will serve the public interest. A well-defined and transparent process providing due process protections is required to make this decision. Currently, the legal framework does not provide procedures to guide such a process. It also does not provide for independent judicial review of a decision finding that a project will serve the public interest.

Section 74 of the Land Act is titled “Procedures for Expropriation.” It contains six short sub-sections that provide little, if any procedural guidance for expropriation proceedings. Sub-section (1) provides the procedure “shall be based on a consultative process with the communities or individuals concerned prior to conception of the plan of expropriation.” It does not define the process or provide procedures to guide it. Public hearings are not required to ensure transparency and sufficient consultation. In cases of large-scale development, sub-section (2) provides only that “a public hearing may be carried out before expropriation.” Additionally, “the history of the acquisition of ownership shall be considered, whether community, individual or private.” The Act does not explain the criteria to be considered and to what end. The Act also prescribes the contents of an expropriation plan but does not explain the significance of the plan, its purpose, or if it must be officially approved. Once the expropriation plan is completed, the Act requires that those directly affected by the plan and the general public be informed of its existence. The Act does not provide any procedures to execute the plan or make reference to any actions for taking land. The procedures in their current form do not meet the Land Policy’s requirements that government officials provide the public clear explanations about its decisions to expropriate and that the proceedings ensure government transparency and accountability.

Most significantly, Section 74 lacks procedures to ensure due process safeguards. It does not guarantee the rights of those affected by the expropriation to be heard at a public hearing. Most significantly, affected persons are provided no right of appeal against an order to expropriate their land. Although Section 77 provides affected persons may petition the court in the event compensation was not paid, it does not provide them with an appeal against the expropriation decision itself or the level of compensation paid. To ensure adequate due process, affected persons should be guaranteed the right to contest the decision to expropriate. For example on the grounds that the investment project was not in the public interest or the expropriation proceedings were not followed correctly and the order is defective. As the Section is currently written, it appears that once the Ministry of Housing, Land and Public Utilities or the Concerned Ministry takes a decision to expropriate land its decisions are final and the only recourse available is to request payment of compensation if not paid. Such procedures contradict the Land Policy’s requirements that those with a legitimate interest in land to be expropriated are provided the opportunity to seek an injunction from the judiciary against the action.

In regards payment of compensation, Section 75 provides:

“compensation shall be just, equitable, and shall take into account the following factors:

- a) the purpose for which the land is being utilized;
- b) the land market value; and

c) the value of the investment in it by those affected and their interest.

Importantly, sub-sections (5) and (6) provide “the type, amount, method and timing of the payment of compensation” shall be agreed prior to the rights in the land can be expropriated. In the event the compensation modalities cannot be agreed, the matter may be determined by the Southern Sudan Land Commission.”

Section 76 of the Land Act provides

“The amount of compensation shall be determined by a Committee where the expropriation is effected and this shall be composed of:

- (1) representative of the Concerned Ministries in the Government of Southern Sudan;
- (2) representative of the Investment Authority;
- (3) representative of the Concerned Ministries at the State Level;
- (4) the concerned County Commissioner;
- (5) representatives of the community concerned or affected; and
- (6) representative of the County Land Authority or Payam Land Council, as the case may be.”

The Land Act does not provide or reference procedures or standards with which to determine the level of compensation to be paid for expropriated property. Similarly, the Draft Land Act Regulations do not provide procedures to determine the level of compensation.

The Draft Regulations do, however, require in Section 26 that compensation proceedings should allow for “full participation of affected communities and individuals.” Additionally, sub-section (3) provides all concerned parties the right to appear and speak to the Committee and sub-section (4) provides “decisions of the Compensation Committee shall be made in writing and read out in public at a date and place notified in advance to all parties who shall have made representations to the Committee.” Under sub-section (5), persons who “made representations” to the Committee may be issued copies of Committee decisions upon payment of “reasonable fees” determined by the Committee.

Sections 22 and 23 of the Regulations provide the number of days within which notice of the expropriation is to be provided to government officials. Section 24 appears to provide that in the notice of expropriation government officials are to be instructed to invite persons whose land will be expropriated to speak before the Compensation Committee.

The Regulations do not specify the roles, duties and responsibilities of the Compensation Committee. It also appears from the Regulations that the decision to expropriate cannot be appealed; the only issue for review is the level of compensation. Section 27 of the Regulations provides that appeals against decisions of the Committee are to be heard by the South Sudan Land Commission. This provision appears to contradict Section 77 of the Land Act as this section only provides that court proceedings can be initiated if compensation has not been paid.

Lastly, Section 25 of the Regulations lists the members of the Compensation Committee. This list is not consistent with the list contained in Section 76 of the Land Act. Among other things, the Regulations do not require that representatives of the concerned community are included on the Committee.

Two additional sections of the Land Act discuss compensation or assistance to communities under circumstances where community land has been taken. Section 64 of the Act is contained in the chapter addressing acquisition of land for investment purposes. It provides that any community or persons affected by investment activities in the area of investment shall be compensated in accordance with the provisions of Section 75 of the Act. Section 72 (1) of the Act provides “the Government of Southern Sudan, State

Government or private company shall proceed with a resettlement plan for the communities affected by an expropriation plan described in Chapter XII of this Act or by any investment activity.” Such provisions might be included in one chapter of the Land Act or future Community Land Act that addresses expropriation of community land and provisions guaranteeing security of customary rights to community land.

Recommended modifications to law:

1. Amend Section 28 (2) of the Constitution’s Bill of Rights to include customary rights to avoid the risk of making them less secure than private rights.
2. Amend Section 8 (2) of the Land Act similarly to mandate that expropriation be carried out only upon order of a court so that it provides the due process safeguards required by the Constitution’s Bill of Rights.
3. Amend Section 171 (10) of the Constitution to mandate that expropriation be carried out only upon order of a court to be consistent with Section 28 (2) of the Constitution.
4. Amend Section 73 (4) of the Land Act so that it allows local government to expropriate land as stated in Section 170 (2) of the Constitution: “the government at all levels may expropriate land in the public interest as shall be prescribed by law.”
5. Amend Section 74 of the Land Act to include procedures on consultations, public hearings, implementing the expropriation plan and ensuring due process safeguards in order to meet the Land Policy’s requirements that government officials provide the public clear explanations about its decisions to expropriate and that the proceedings ensure government transparency and accountability.
6. Amend Section 76 of the Land Act to include procedures or standards with which to determine the level of compensation to be paid for expropriated property.
7. Amend Section 77 of the Land Act to ensure that the public may appeal against the expropriation decision itself or the level of compensation paid.

7.0 LAND CONFLICTS

The Policy recognizes the role the South Sudan Land Commission and state-level Land Commissions will play to mediate land-related conflicts. These institutions can assist local land administration and traditional authorities to peacefully and equitably resolve conflict. Such conflict includes those between pastoral groups and agricultural communities over common property resources including water and grazing land. To assist local institutions in mediating conflict, central government and states should give recognition to alternative dispute resolution mechanisms and establish criteria for determining the appropriate channels and authority to resolve dispute cases. The Policy requires that “both national-level and state laws shall clearly define the proper circumstances and processes for appealing outcomes to higher levels.”

Chapter XV of the Land Act governs settlement of land disputes. Section 91 provides:

- (1) In resolving disputes related to land, priority shall be given to:
 - a) alternative dispute resolution which includes dispute resolution processes and mechanisms that fall outside the government judicial process; and
 - b) traditional dispute resolution mechanisms.
- (2) Customary law and practice of the locality shall apply to resolve disputes related to land.

Section 92 provides parties to a dispute the option to use mediation to resolve the dispute. This option is specifically mentioned in Section 24 (3) of the Act concerning breaches of lease agreements. According to section 92 (2) the mediator “shall be designated upon request by the parties from amongst

Draft Land Policy Statements 10 and 19: On Mediation of Land Rights Conflicts and On Mediating Agricultural Land Use Conflicts

members of the County Land Authority, the Payam Land Council or Traditional Authority depending on the area where the conflict occurs.” The Act does not, however, provide procedures with which to register or otherwise give legal effect to the agreement reached by the parties through mediation.

Draft Regulations Section 34 (6) requires mediation agreements to be filed at the Payam Land Council and County Land Authority. It is also noted in the Section 34 (7) of the Regulations that the Concerned Minister in each State “shall issue guidelines on mediation of land disputes...for proper conduct of mediation proceedings.”

Parties to a dispute are also provided the option to resolve the issue through arbitration. Similar to mediation, Section 94 (1) of the Land Act provides the parties may apply for arbitration to the Payam Land Council or Traditional Authority depending on the area where the conflict occurs. Also similar to mediation, the Act does not describe procedures to give legal effect to the arbitration decision.

Section 35 (8) of the Draft Regulations requires filing the arbitration award at the Payam Land Council and the County Land Authority.

Section 96 (2) of the Land Act provides that the parties can appeal against the decision of the arbitration committee to the South Sudan Land Commission. Section 36 (6) of the Draft Regulations provides “the Chairperson shall with the approval of the President of the Supreme Court issue rules and guidelines the conduct of arbitration proceedings and appeals to the Commission against arbitration awards.”

According to Section 99 of the Land Act, parties to a dispute also have the option to petition the Land Division in the State High Court to resolve the matter. There is no requirement that the parties attempt to mediate or arbitrate the matter prior to litigating in the High Court. The Draft Regulations do, however,

require in Sections 33 (3) and 37 (3) that alternative dispute procedures be exhausted before the matter can be brought before the High Court.

The provisions of the Land Act appear to meet the minimum requirements as they recognize alternative dispute resolution mechanisms and provide for the right of appeal to higher levels. The provisions should be strengthened to provide more detailed appeals procedures that clarify the proper circumstances for appeals and clearly define the process. Additionally, state authorities should develop a system to register mediation and arbitration decisions.

Section 98 (3) (d) of the Local Government Act provides that “voluntary mediation and reconciliation agreements between parties shall be recognized and enforced” by the Customary Law Courts. Under Section 100 (4) (f), customary Regional Courts or “B” Courts have jurisdiction to hear customary land disputes.

Section 121 of the Local Government Act provides that the South Sudan Council of Traditional Authority Leaders is responsible to apply customary and traditional conflict resolution mechanisms to intervene in instances of inter-tribal disputes. According to Section 128 (2) of the Act, Councils within the same state that have disputes over Council boundaries, grazing areas and water points “shall settle any disputes amicably among themselves through involvement of Traditional Authorities.” The Act does not provide or reference any procedures for resolving such disputes or enforcement of any agreements reached under the process.

Provisions of the Land and Local Government Act are inconsistent as the Land Act does not reference or appear to recognize jurisdiction of customary courts. Additionally, Local Government Act does not provide clear criteria for determining which land disputes are to be heard by the High Court and which are to be heard by the customary courts. The Land Act should be amended to recognize the authority of customary courts. Central and state-level officials should harmonize the provisions of both acts to ensure they provide clear criteria to determine the proper channels and authority to hear disputes. The absence of legislation clearly defining the jurisdiction of statutory and customary courts creates the potential for duplicative proceedings and “forum shopping” where parties bring the same claim to two courts and attempt to obtain enforcement of the most favorable decision.

Recommended modifications to law:

1. Amend Section 91 of the Land Act to establish criteria for determining the appropriate channels and authority to resolve dispute cases.
2. Amend Section 91 of the Land Act so that it recognizes the authority of customary courts.
3. Amend Section 92 of the Land Act to provide procedures with which to register or otherwise give legal effect to the agreement reached by the parties through mediation.
4. Amend Section 94 of the Land Act to provide procedures with which to register or otherwise give legal effect to the agreement reached by the parties through arbitration.
5. Amend Section 96 (2) of the Land Act to provide more detailed appeals procedures that clarify the proper circumstances for appeals and clearly define the appeals process.
6. Amend Sections 121 and 128 of the Local Government Act to provide procedures for the use of traditional authorities in resolving inter-tribal or inter-state disputes and enforcement of any agreements reached under the process.
7. Amend Section 121 of the Local Government Act to provide clear criteria for determining which land disputes are to be heard by the High Court and which are to be heard by the customary courts.

8.0 LAND USE PLANNING AND MANAGEMENT

The Land Policy recognizes that “land use planning is essential to the efficient and sustainable utilization and management of land and land based resources.” Lack of technical and institutional capacity, coordinating framework to prepare and present planning proposals and a national land use framework has resulted in uncontrolled urban expansion, land use conflicts, environmental degradation and spread of informal settlements. Protection of eco-systems and urban environments depends on sound policies and collaborative planning processes. The Land Policy recommends that a Town and Country Planning Act be enacted and harmonized with existing legislation “to provide an appropriate framework for preparation and implementation of national, regional and local area land use plans and ensure the planning process is integrated, participatory and meets stakeholder needs.”

Additionally, a national land use policy must be developed to serve as the basis for land use management.

Draft Land Policy Statements 16: On Land Use Planning and Management

Protection of the environment is one of the fundamental objectives and guiding principles underpinning the Constitution. Section 41 (3) provides that “appropriate legislative action” is required to protect the environment for the benefit of citizens and future generations. Environmental regulation should balance “ecologically sustainable development and use of natural resources” with “rational economic and social development so as to protect genetic stability and bio-diversity.”

A review of the legal framework relevant to land reveals no substantive provisions related to development of land use policies and plans. Chapter XI of the Land Act is dedicated to land use and social and environmental protection. It contains no provisions and makes no reference to land use planning or management. Section 42 (2) provides that national government has oversight of state level town and rural planning as provided in Section 43 (5). States are also responsible for land zoning under sub-section (13). Section 61 (2) references a comprehensive land use plan that delineates land into zones to facilitate investment as required by the Investment Act. Under sub-section (3), the land zoning system is to be adopted in consultation with the community concerned and comply with the existing Land Use Plan. Section 66 (1) provides that the land use planning system referred to in Section 61 is also to be delineated to include pastoral lands to be protected.

Schedules I (27) and II (5) of the Local Government Act confer local government councils with exclusive power over town and rural planning and concurrent powers with the state over urban development and planning. The Act also requires in Section 88 (1) (b) that states in consultation with Local Government Councils produce Land Use Master Plans. Local Government Councils are then required to prepare policy guidelines for land use rights (Section 91 (3) (d)) and to enact by-laws to regulate land use control and protection (Section 92 (1) (a)).

The current legal framework provides local government with almost exclusive responsibility for land use planning and management but provides no legislative guidance for doing so. The Land Policy recommends that national standards are needed to guide local planning. Such standards are to be provided in a National Town and Country Planning Act and national land use policy. National standards will help ensure local planning processes are fully participatory and transparent, promote sustainable use of natural resources and are integrated across sectors to ensure use of land is productive, peaceful and environmentally responsible.

Recommended modifications to law:

1. The Land Act and Local Government Act confer land use planning and management authority to local government; however, national standards are needed to guide local planning. A National Town and Country Planning Act and national land use policy should be drafted to provide these standards which will help ensure local planning processes are fully participatory and transparent, promote sustainable use of natural resources and are integrated across sectors to ensure use of land is productive, peaceful and environmentally responsible.

9.0 INFORMAL SETTLEMENTS

The Land Policy recognizes that the land and service needs of residents of informal settlements are legitimate. As such, its preference is to upgrade existing settlements. The Policy does not endorse forced removal of informal settlement inhabitants and in cases where there is an absolute need to do so, inhabitants must be provided due process of land, compensation for lost investments in housing and resettlement alternatives that provide adequate and secure access to land.

The legal status of inhabitants of informal settlements is that of an unlawful occupant or “squatter”. Many of these inhabitants were forced from their homes during the conflict and forced to become squatters. Chapter XIV of the Land Act addresses the issue of unauthorized occupancy and eviction but does not differentiate between internally displaced persons forced into informal settlements and

**Draft Land Policy Statement 14: On
Extending Tenure Security to
Residents of “Informal” Settlements**

individuals who knowingly encroach upon or occupy land owned by another as part of a bad faith attempt to lay claim to this land. As such, public authorities may file for an order to evict inhabitants of informal settlements under Section 85 (1) of the Land Act. Minimum due process protections are provided to those served with a notice to evict. Section 86 requires a judge to grant an order of eviction based on examination of “all the relevant circumstances.” Section 88 provides those served with an eviction order to appeal the decision to a higher court. There is no requirement, however, to provide inhabitants of informal settlements with suitable alternative land and compensation for investments they may have made to construct shelter. Section 87 provides only that in cases where a public authority initiates eviction proceedings “minimum standard alternative resettlement conditions *may* be provided by the authorities” (emphasis added). As such, it appears provision of alternative conditions for shelter is not mandated; rather it is left to the discretion of the authority seeking eviction. Additionally, Section 87 does not provide compensation for investment made in housing. Compensation for such investment is available only to “bona fide” occupants who occupied land in good faith under Section 89. It is unlikely that inhabitants of informal settlements will meet the requirement of good faith occupation.

To comply with the guidance provided by the Land Policy, the Land Act should be amended to reflect the Policy’s preference for upgrading existing settlements. It should also contain provisions that differentiate between inhabitants of informal settlements and those who intentionally occupy land in bad faith. Amendments should also mandate provision of alternative shelter and payment of compensation for investments made by individuals to construct housing from which they were evicted.

Recommended modifications to law:

1. Amend Section 85 of the Land Act to reflect the Land Policy’s preference for upgrading existing settlements and to provide provisions that differentiate between inhabitants of informal settlements and those who intentionally occupy land in bad faith.
2. Amend Section 85 to differentiate circumstances of those living in informal settlements and those who intentionally occupy land in bad faith.
3. Amend Sections 87 and 89 of the Land Act to mandate provision of alternative shelter and payment of compensation for investments made by individuals to construct housing from which they were evicted.

10.0 RESTITUTION OF LAND RIGHTS

The policy recognizes that secure land rights for refugees, IDPs and returnees are essential for sustainable peace in South Sudan. As part of a strategy to assist IDPs and refugees to make free and informed decisions to find a durable solution to displacement, the Policy recommends the deadline for filing requests for restitution of land rights be extended and capacity of the Land Commission and traditional authorities be built to decide such requests in a timely manner. In addition to deciding restitution claims to facilitate return and re-integration, the Policy recognizes that displaced persons may wish to remain where they have settled after displacement or may choose to settle elsewhere.

To give effect to the strategy recommended by Policy the Land Act will need be amended and a set of regulations defining restitution procedures drafted. In regards to relevant provisions of the Land Act, Section 78 (4) will need to be amended to extend the period for filing requests for restitution. Section 79 of the Act might also be amended to clarify the jurisdiction of Traditional Authorities, the Land Commission and courts to receive and adjudicate restitution claims. It appears that all are competent to hear claims. Without criteria and procedures to guide where claims are to be submitted, the potential exists for multiple claims for the same parcel of land to be submitted to and decided by all three bodies.

Draft Policy Statement 3: On Restitution of Land Rights

The Act might be amended to clarify the role of the Land Commission. The language contained in Section 79 (7) and (9) read together gives the impression that rather than adjudicating and issuing final decisions on requests for restitution, the Land Commission's role is to facilitate agreement between the parties and if an agreement is not reached, the parties may refer the matter to a court of law for decision. In addition to clarifying which body has authority to issue a final decision on a request for restitution, the Act should be amended to provide for a clear right of appeal against any final decision.

Provisions contained in Chapter XIV on unauthorized occupancy should be harmonized with those on restitution. Similar to the discussion above in regards informal settlements, the Act should make clear the circumstances that would warrant an eviction proceeding under Section 84. Otherwise it is possible eviction orders might be sought by persons who would otherwise have a claim for restitution of property lost as a result of hostilities commencing after 16 May 1983.

Section 80 of the Act provides requestors with an option to request compensation in the event restitution is not possible. The Act might be amended to clarify the level of compensation to be awarded. According to the definition of compensation provided in Section 4, compensation will be paid according to market value of the property at the time the request is decided. It appears this definition applies to expropriations carried out after the Act went into effect as well as for historic injustices. It is possible, however, that the value of land lost 30, 20 or even 10 years ago has increased considerably. The financial burden to the state should be considered before it commits to paying current market value as compensation for historic takings.

The Draft Regulations provide guidance on procedures for filing requests for restitution in Section 29. For example, Section 29 (1) requires claims (requests) to be recorded serially in the order they were received; Section 29 (2) defines the methods for filing claims; and Section 29 (3) defines the information to be included in the claim. The Regulations do not, however, provide legal criteria and procedures for deciding requests. Additionally, the Regulations do not recognize the authority of courts and traditional authorities to receive

and adjudicate claims and do not contain any provisions on appeals from the Land Commission's decisions. To comply with the recommendations of the Draft Land Policy, a comprehensive regulation should be drafted to define the substantive legal procedures required to adjudicate restitution claims.

In addition to return and re-integration, the Land Policy suggests two other pathways to restore and normalize land rights of displaced persons: local integration and settlement elsewhere. Customary law may not recognize the rights of non-members to settle on community land, thereby creating a barrier to integrating IDPs into the society where they settled. Legislation may be needed to regularize IDP occupation of land not claimed by other individuals and not included in an informal settlement. Given that customary practice is ingrained in many societies and may not readily adapt to the requirements of new legislation, sensitization of the host population to the needs of IDPs and mediation with traditional authorities will likely also be required to regularize IDP occupation.

In regards the option to settle elsewhere, Section 83 of the Land Act provides that the GoSS or state government may acquire land for persons displaced as a result of the civil war. Although this provision would support the strategy suggested by the Policy, current procedures through which government may acquire land (be it for investment or to resettle IDPs) are not sufficiently transparent, participatory and well-defined to provide secure tenure to IDPs. It is essential that its solution to provide land to IDPs does not create a new class of displaced persons.

Recommended modifications to law:

1. Amend Section 78 (4) of the Land Act to extend the period for filing requests for restitution.
2. Amend Section 79 of the Land Act to clarify the jurisdiction of traditional authorities, the Land Commission and courts to receive and adjudicate restitution claims.
3. Amend Section 79 (7) and (9) of the Land Act to clarify the role of the South Sudan Land Commission in adjudicating and issuing final decisions on requests for restitution.
4. Amend the Land Act to provide for a clear right of appeal against any final decision.
5. Harmonize provisions contained in Chapter XIV on unauthorized occupancy with those on restitution.
6. Amend Section 84 of the Land Act to clarify the circumstances that would warrant an eviction.
7. Amend Section 80 of the Land Act to clarify the level of compensation to be awarded in the event restitution is not possible.
8. Draft a comprehensive regulation to define the substantive legal procedures required to adjudicate restitution claims.

11.0 GENDER

The policy requires all government agencies and all traditional authorities to ensure that men and women enjoy equality of rights to land and other property and equal treatment when exercising these rights. Laws themselves must also provide for equal treatment; the Policy recommends that laws governing marriage and inheritance be drafted to provide women with equal rights to property and require central and state governments to monitor compliance with these laws. It also encourages local land administration bodies to provide information and services to women to assist them in exercising their rights to land.

Draft Policy Statement 7: On the Equality of Men and Women in the Exercise of Land Rights

The Constitution's Bill of Rights clearly states that men and women enjoy equality of rights to land and other property. Section 16 (1) provides generally that "women shall be accorded full and equal dignity of the person with men" and sub-section (5) specifies "women shall have the right to own property and share in the estates of their deceased husbands together with any surviving legal heir of the deceased." The guarantee stated in the Constitution is essentially restated in Section 13 (4) of the Land Act and Section 110 (5) of the Local Government Act. None of these provisions, however, explicitly provide women with the right to own and possess land in their own right.

The Land and Local Government Acts and the Draft Regulations contain provisions requiring adequate representation of women on bodies and committees responsible for land issues. Sections 45 (1) (f) and 49 (1) (e) of the Land Act requires one woman representative on the County Land Authority and Payam Land Council respectively. Section 110 (4) (a) requires that 25 % of the members of the Legislative and Executive organs of Local Government Councils are women. The Draft Regulations provide in Section 25 that 50% of those serving on local compensation committees formed to determine compensation in expropriation proceedings are women.

The Policy recognizes the need to redraft legislation governing marriage, inheritance, and related issues to ensure all women (including divorced, widowed, daughters, etc.) enjoy equal protection under the law. In theory, customary law is required to conform to the provisions of formal legislation governing marriage and inheritance and guaranteeing equal treatment for women. In practice, principles contained in customary law are ingrained, valued and respected by South Sudan's political class and population. As such, change will be gradual and require a shift in societal values that will not be achieved through legislation alone. A systematic assessment of all customary law practiced in the country should be completed to identify practices that do not conform to statutory guarantees of equality. Capacity of both judges and traditional authorities should be built for each to have a better understanding of the other's legal framework.

The Policy also recommends specific actions to ensure statutory guarantees of gender equality are achieved in practice. These include programs to ensure women are recruited and trained to serve in land administration roles and monitor compliance with laws requiring the adequate representation of women on land administration bodies. It may be more appropriate to establish such programs through comprehensive gender equality legislation. Similarly, government initiatives to support paralegal organizations to provide legal advice to and inform women about their rights to property might be included in a comprehensive gender strategy and action plan.

Recommended modifications to law:

1. Amend Section 16 of the Constitution's Bill of Rights, Section 13 (4) of the Land Act and Section 110 (5) of the Local Government Act to explicitly provide women with the right to own and possess land in their own right.
2. Draft comprehensive gender equality legislation to ensure statutory guarantees of gender equality are achieved in practice (i.e. programs to ensure women are recruited and trained to serve in land administration roles and monitor compliance with laws requiring the adequate representation of women on land administration bodies).

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